LE COPY

FILED
NOV 14 1958
JAMES R. BROWNING, Clerk

No. 516

IN THE

Supreme Court of the United States

October Term, 1958

SPRINGFIELD TELEVISION BROADCASTING CORPORATION,

and

GREENFIELD TELEVISION BROADCASTING CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,
FEDERAL COMMUNICATIONS COMMISSION,

THE TRAVELERS BROADCASTING SERVICE CORPORATION, and
THE WGBH EDUCATIONAL FOUNDATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

By JAMES A. MCKENNA, JR.
VERNON L. WILKINSON
Counsel for Petitioners

Of Counsel:

MCKENNA & WILKINSON
1735 DeSales Street, N. W.
Washington 6, D. C.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
REASONS FOR ALLOWANCE OF THE WRIT	15
1. The Decision Below Contravenes Congressional Policies Embodied in the Communications Act	15
2. The Decision Below Is in Conflict with This Court's Decision in the Chenery Case	21
3. The Decision Below Raises Important Questions Which Have Not Been but Which Should be Resolved by This Court	24
4. The Decision Below Should in Any Event Be Vacated	27
APPENDIX A	29
APPENDIX B	35

TABLE OF CASES

Channel Assignment to Columbia, S.C., 15 RR 1682 (1957)	19, 25
Channel Assignments in Pittsburgh, Pa., 16 RR 1558 (1957)	25
Channel 16 of Rhode Island v. Federal Communications Commission, Case No. 12537 et al (U.S. App. D.C.)	13
Coastal Bend Television Co. v. Federal Communications Commission, 97 U.S. App. D.C. 339, 231 F.2d 498 (1956)	9

PAGE

Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956) 9
Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358 19
Federal Communications Commission v. National Broadcasting Company, 319 U.S. 239 20
General Times Television Corp., 11 RR 625 (1954) 8
Gerico Investment Co. v. United States, 99 U.S. App. D.C. 379, 240 F.2d 410 (1957) 10
Greylock Broadcasting Co. v. United States, 97 U.S. App. D.C. 414, 231 F.2d 748 (1956) 9
Jacksonville Journal Co. v. Federal Communications Commission, 101 U.S. App. D.C. 12, 246 F.2d 699 (1957) 10
Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 175 F.2d 351 20
L. B. Wilson, Inc. v. Federal Communications Commission, 83 U.S. App. D.C. 176, 170 F.2d 793 (1948) 19
Morgan v. United States, 298 U.S. 468 (1936) 20
National Broadcasting Co. v. Federal Communications Commission, 76 U.S. App. 253, 132 F.2d 545, aff'd 319 U.S. 239 20
National Broadcasting Co. v. United States, 319 U.S. 190 20
Owensboro on the Air, Inc. v. Federal Communications Commission, Case No. 13,776, et al (U.S. App. D.C.) 28
Philadelphia Co. v. Securities and Exchange Com'n, 84 U.S. App. D.C. 73, 175 F.2d 808 (1948), dismissed as moot 337 U.S. 901 ..... 20, 25
Sangamon Valley Television Corp. v. United States, 255 F.2d 191 (U.S. App. D.C. 1958) 21, 22, 24
Sangamon Valley Television Corp. v. United States (No. 235, Oct. Term 1958) 2, 3, 11, 19, 22, 27, 28

PAGE

Schaffer Transportation Co. v. United States, 355 U.S. —— 16, 21
Securities and Exchange Com. v. Chenery Corp., 318 U.S. 80 ..... 2, 21, 22, 23, 24
Springfield Television Broadcasting Corp. v. United States, —— F.2d —— (U.S. App. D.C. 1958) 1, 25, 27, 29-34
Springfield Television Broadcasting Corp. v. Federal Communications Commission, Case No. 13311 (U.S. App. D.C.) 11
Van Curler Broadcasting Co. v. United States, 98 U.S. App. D.C. 432, 237 F.2d 828 (1956) 10
Van Curler Broadcasting Co. v. United States, (No. 489, Oct. Term 1956) 28
Walla Walla Reintermixture Case, 16 RR 1636 (1958) 25
Winnebago Television Corp. v. United States, 258 F.2d 163 (U.S. App. D.C. 1958) 25
WIRL Television Co. v. United States, 253 F.2d 863 (U.S. App. D.C. 1958) 19, 21, 24
WIRL Television Co. v. United States (No. 242, Oct. Term 1958) 2, 3, 11, 17, 19, 27, 28

STATUTES AND REGULATIONS

Administrative Procedure Act
Section 4(b) (5 U.S.C. Sec. 1003(b)) 21
Communications Act of 1934, as amended
Section 303(f) (47 U.S.C. Sec. 303(f)) 25, 26
Section 303(g) (47 U.S.C. Sec. 303(g)) 2, 3, 8, 16, 22, 25, 26
Section 307(b) (47 U.S.C. Sec. 307(b)) 3, 8, 10, 14, 17, 19, 22, 23, 25, 26
Section 316 (47 U.S.C. Sec. 316) 25, 26
Section 402(a) (47 U.S.C. Sec. 402(a)) 15, 26
Section 402(b) (47 U.S.C. Sec. 402(b)) 15, 26
Section 402(j) (47 U.S.C. Sec. 402(j)) 2

PAGE

Section 405 (47 U.S.C. Sec. 405) 15
Judicial Code
Section 1254(1) (28 U.S.C. Sec. 1254(1)) 2
Rules and Regulations of the Federal Communications Commission
Section 3.606 (1 RR 53:606) 5, 6

MISCELLANEOUS

CBS Press Release (October 9, 1958) 18, 35-36
Davis, "Requirement of a Trial-Type Hearing," 70 *Harvard Law Review* 193 (1956) 21
Hearings on S. 3095, 83d Cong. 2d sess. 7, 8
Hearings, "Television Inquiry," 85th Cong. 1st sess. 24
Jones Report of February 12, 1955 9
Plotkin Report of February 1, 1955 9
Senate Rep't No. 2769, 84th Cong. 2d sess. 11
Television Allocation Proceedings of the FCC:
FCC Report and Order of November 10, 1955, 13 RR 1511 9
FCC Memorandum Opinion and Order of November 10, 1955, 13 RR 1522 9
FCC Notice of Proposed Rule Making of November 10, 1955, 20 Fed. Reg. 8501 9
Second Report on Deintermixture, 13 RR 1571 ..... 4, 5, 10, 11, 12, 13, 15, 16, 17, 19, 21, 22, 23, 24, 26, 27
22 Federal Register 2050 3127, 3185, 4365, 5613 25
22 FCC 293 (Albany - Schenectady - Troy - Vail Mills) 15, 19, 21, 25
22 FCC 307 (Elmira) 16, 21, 24
22 FCC 318 (Springfield-St. Louis-Terre Haute) 16, 21, 24, 27
22 FCC 332 (Hartford-Providence) 1, 14, 16, 17, 21, 22, 24, 27
22 FCC 342 (Peoria-Rock Island-Davenport-Moline) 16, 21, 24, 27
22 FCC 356 (Madison-Rockford) 16, 21, 24

PAGE

22 FCC 365 (Fresno-Bakersfield-Santa Barbara)....16, 21, 22, 24, 25
22 FCC 382 (Evansville).....16, 21, 24, 25
23 FCC 57 (Hartford) 1, 18
1 Pike & Fisher, Radio Regulation, Pt. III, pp. 91:661-665 5
Report in FCC Docket No. 6651, Mimeo. 82387, May, 1945 5
FCC Mimeo 65051..... 27

IN THE

Supreme Court of the United States

October Term, 1958

No. ——

SPRINGFIELD TELEVISION BROADCASTING CORPORATION,

and

GREENFIELD TELEVISION BROADCASTING CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,
FEDERAL COMMUNICATIONS COMMISSION,
THE TRAVELERS BROADCASTING SERVICE CORPORATION, and
THE WGBH EDUCATIONAL FOUNDATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet reported, is printed as Appendix A hereto. The basic decision of the Federal Communications Commission (R. 751-760) is reported at 22 FCC 332, and its decision denying rehearing (R. 869-872) at 23 FCC 57.

JURISDICTION

The judgment of the court below, affirming the Commission, was entered on June 19, 1958. By Order of the Chief Justice dated September 10, 1958, the time for filing a petition for a writ of certiorari was extended to November 15, 1958, pending action by this Court on petitions for certiorari in Nos. 235 and 242 (Oct. Term, 1958). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and 47 U.S.C. Sec. 402(j).

QUESTIONS PRESENTED

1. Whether, in a proceeding where the impact on an existing broadcast licensee of a proposed "rule" is "particular and immediate" rather than "general and future," the Federal Communications Commission is required to consider pertinent public interest factors raised by the parties thereto, to summarize the basic facts there developed, and to draw rational and logical conclusions therefrom.

2. Whether a court is in a position to discharge its responsibility of determining whether basic policies which Congress has set forth in the governing statute are or are not being effectuated by the Commission, where the agency decision ignores relevant public interest considerations, where the conclusions do not rationally flow from the findings made, and where the result is patently and unexplainably inconsistent with the decisions of a different majority of the Commission in related proceedings decided the same day.

3. Whether principles enunciated by this Court in the *Chenery* case were incorrectly applied by the court below—in a proceeding instituted by the Commission for the purpose of determining *as a factual matter* whether the deletion of a VHF channel allocated to a given market would result in more service rather than less service (47 U.S.C. Sec. 303(g)) and where a key vote in the

Commission's subsequent 4-3 refusal to deintermix that market was predicated on an erroneous legal interpretation of 47 U.S.C. Sec. 307(b).

4. Whether this Court, in view of its actions vacating the judgments of the court below in related deintermixture cases (Nos. 235 and 242) should likewise vacate the instant judgment, inasmuch as these several proceedings were all instituted by the Commission on the same day (June 26, 1956), decided by the Commission on the same day (March 1, 1957), and (by reason of their close legal and factual interrelationship) should be reconsidered by the Commission at one and the same time.

STATUTES INVOLVED

Sections 303(g) and 307(b) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 303(g) and 307(b)) provide:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; . . .
>
> Sec. 307. (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

STATEMENT

The proceedings before the Federal Communications Commission, giving rise to the instant petition for certiorari, stem from the fact that television broadcasting is currently furnished the public by stations operating in

two different portions of the radio spectrum—on very high frequency channels (VHF Channels 2-13) and on ultra-high frequency channels (UHF Channels 14-83). Petitioners provide a television service on UHF to substantial portions of the Connecticut River Valley,[1] and in doing so compete against a long-time VHF operation on Channel 8, New Haven, Conn. (R. 301). Over petitioners' objections and despite mounting data of recent years that UHF stations cannot long continue to operate in areas served by *two* VHF stations (see R. 331-344, 366), the Commission by the 1957 actions here challenged, authorized a *second* VHF station in the Connecticut Valley (by granting VHF Channel 3, Hartford, Conn. to respondent The Travelers Broadcasting Service Corporation)—even though that channel had been assigned to Hartford in 1952 under an allocation concept which the Commission in the interim had repudiated in its *Second Report on Deintermixture* (13 Pike & Fisher, *Radio Regulation*, 1571 (1956)).[2]

Briefly stated, the following background facts are necessary to a proper understanding of the instant controversy:

In its spectrum allocation report in 1945, the Commission made it clear that the 13 VHF channels which it there set aside for television use were all that could be spared for that purpose in the VHF portion of the spectrum, that 13 channels (later reduced to 12) were insuf-

---

[1] The Connecticut River in its southerly course, after forming the boundary between Vermont and New Hampshire, bifurcates three counties in central Massachusetts (Franklin, Hampshire and Hampden) and two counties in Connecticut (Hartford and Middlesex). The southern (Massachusetts-Connecticut) half of the valley thus formed by the Connecticut River (hereinafter referred to as the Connecticut Valley) is one of the most densely populated areas in the United States with such urban centers as Middletown, New Britain, and Hartford, Conn., and Springfield, Holyoke, Northampton, and Greenfield, Mass. (cf. R. 753).

[2] Hereinafter cited as —— RR ——.

ficient to provide enough outlets for a nationwide competitive television system,[1] and that television must ultimately find a "home" in the UHF portion of the spectrum. The Commission accordingly reserved a substantial part of the UHF band for *experimental* television purposes.[2]

As television mushroomed and unforeseen interference problems arose, the Commission's belief that more television channels would be needed was soon vindicated. Accordingly, in its Sixth Report of April 14, 1952, issued after a four-year study and a four-year "freeze" on new grants (1948-1952), the Commission added 70 UHF channels (Channels 14 through 83) to the 12 VHF channels theretofore authorized for television use. Basic to this 1952 report, which allocated specific channels to designated cities (see 1 RR 53:606), was the assumption (then justified but disproved by subsequent developments) that the "intermixture" of VHF and UHF channels in the same major markets would compel the manufacture of nothing but all-channel receivers (para. 189), and that the new UHF channels would thus become in due course "an integral part of a *single*, nationwide television service" (para. 197).[3]

However, the 1952 allocation table provided for less intermixture in New England than in other portions of the United States because of two fortuitous circumstances: seven VHF channels were already being utilized

---

[1] "As the Commission has recognized from the outset, and has frequently reaffirmed, the 12 VHF channels alone, are not adequate to make possible sufficient outlets for a fully competitive television system." *Second Report on Deintermixture* of June 26, 1956, 13 RR 1571, para. 12.

[2] Report in FCC Docket No. 6651, Mimeo 82387, May 1945 (see 1 RR Pt. III, pp. 91:97-98).

[3] Sixth Report of April 14, 1952, 1 RR Pt. III, 91:661-665. Emphasis supplied throughout this petition.

by "pre-freeze" stations in New York City, two in Boston, and one each in New Haven, Providence and Schenectady; these channels could not therefore be duplicated (because of mileage separations needed to avoid interference) in other cities in the highly urbanized New England region. As a result, in its Sixth Report (1 RR 53:606) the Commission was able to allocate VHF channels to only one city in the entire state of Massachusetts (Boston on the eastern seaboard), to one city in Rhode Island (Providence), to one city in eastern upstate New York (Schenectady), and to two cities in Connecticut (New Haven and Hartford).[1] Other substantial cities in Connecticut (e.g., Bridgeport, New Britain, New London, Stamford, and Waterbury), in central and western Massachusetts (e.g., Springfield, Holyoke, Greenfield, Worcester, Pittsfield and North Adams), and in eastern upstate New York (e.g., Troy, Albany, Poughkeepsie, and Kingston) were allocated UHF channels only (1 RR 53:606). These cities, in order to have their own television outlets, were thus entirely dependent on the ultimate establishment and development of UHF (see R. 753, para. 5). In short, but for Channel 8 in New Haven (already being utilized) and Channel 3 allocated to Hartford, the entire Connecticut River Valley was exclusively UHF (see 1 RR 53:606).

Believing then, as did the Commission, that UHF would ultimately become a part of a "single" integrated system, UHF channels were applied for, grants were made, and UHF stations went on the air in Bridgeport, Hartford, New Britain and Waterbury, Conn., in Springfield, Holyoke, Worcester, Greenfield, Adams-Pittsfield, Mass., and in Albany, Troy, and Poughkeepsie, N. Y.[2]

---

[1] All these cities except Hartford (VHF Channel 3) had "pre-freeze" VHF operations.

[2] At the time the instant record was compiled in December of 1956, UHF stations were still operating in each of the above-named cities except Worcester and Poughkeepsie (R. 337, 339).

Among such UHF pioneers were petitioners, Springfield Television Broadcasting Corporation and its wholly owned subsidiary Greenfield Television Broadcasting Corporation, which currently provide a UHF service to southern New Hampshire and Vermont, central Massachusetts, and northern Connecticut with the following facilities: Station WWLP, Springfield, Mass. on UHF Channel 22; station WRLP, Greenfield, Mass. on UHF Channel 32; translator stations W79AA and W81AA, Claremont and Lebanon, N. H., on UHF channels 79 and 81.

With grants of many of the VHF channels listed in the 1952 allocation table tied up for several years in comparative hearings (because of multiple applicants desiring those wider-coverage channels), UHF stations enjoyed a rapid growth in those portions of New England (and elsewhere) not surfeited with VHF signals (see R. 366). But it soon became evident, in those areas receiving *two* or more VHF signals (from stations affiliated with the two major television networks—CBS and NBC), that the UHF stations could not obtain suitable program material, that without desirable programs they had no viewing audience, and that without a viewing audience they had no revenues, with the result that set manufacturers continued to flood such areas with less expensive VHF-only receivers (see R. 331-344, 366).

Thus, by the time of the so-called Potter hearings in May and June of 1954,[1] it was becoming apparent to large segments of the television industry that the Commission's 1952 policy of intermixing VHF and UHF channels in the same area was a mistake, and that UHF stations in the larger markets were folding on the advent of a *second* VHF service and in the smaller markets on

[1] Hearings on S. 3095, "Status of UHF and Multiple Ownership of Television Stations," Subcommittee on Communications of Senate Committee on Interstate and Foreign Commerce, 83d Cong. 2d Sess., *passim*.

the advent of a *first* VHF service (R. 331-344, 366).[1] In such VHF areas UHF assignments were merely "paper allocations" and failed to provide "radio service" which the Commission is under a mandate to distribute equitably (47 U.S.C. Sec. 307(b)). It seemed apparent that if the United States was not to be limited to television on 12 rather than the 82 channels envisaged by the Sixth Report, a change in allocation concepts was necessary. It was urged that the removal of VHF channels from markets where UHF stations were providing competitive service and the utilization of the deleted VHF channels in other areas already so predominantly VHF that UHF stations could not obtain a foothold (i.e., a policy of "deintermixture") would result in substantially more competitive service throughout the United States and a more effective utilization of valuable spectrum space, in line with mandatory requirements of Sections 303(g) and [illegible](b) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 303(g) and 307(b)).

Numerous petitions were accordingly filed with the Commission in the summer and fall of 1954 proposing a change in Commisison policy—from that of "intermixture" to a policy of "deintermixture." These petitions, including those filed by petitioners and by certain other UHF operators in the Connecticut Valley, requesting that Channel 3 in Hartford, Conn. be reserved for noncommercial educational use, were summarily rejected by the Commission in the fall of 1954, principally on the ground that the VHF applicants for Channel 3 had spent considerable money prosecuting their applications in reliance on the Sixth Report (11 RR 625, 628).

As a result of subsequent studies realeased by various committees of Congress, strongly intimating that "private considerations" of this nature should not be allowed to

[1] See the so-called Potter Hearings of May-June 1954 (hearings on S. 3095, 83d Cong. 2d sess.), *passim*.

outweigh the "public interest,"[1] the Commission on March 31, 1955 reconsidered its earlier actions and instituted five "pilot" rulemaking proceedings looking toward the deintermixture of various television markets, including Hartford (FCC Docket No. 11336).[2] The Commission decided, pending a resolution of those proceedings, not to complicate the picture by making additional VHF grants in areas which were predominantly UHF.

After receiving voluminous written data and hearing oral argument thereon, the Commission in three related actions of November 10, 1955 concluded that the concept of intermixture had been "basic" to the Sixth Report and that the "pilot" deintermixture proceedings should be denied as premature, *until* a general rule-making proceeding ordered that same day, in which the Commission proposed to take an over-all look at its Sixth Report, had been completed (FCC Docket No. 11532).[3] However, a majority of the Commission decided at this juncture not to postpone action in VHF comparative proceedings pending its re-examination of the Sixth Report in Docket No. 11532 (13 RR 1511, 1518, para. 11).[4]

---

[1] See the so-called Plotkin and Jones Reports of February 1 and 12, 1955 (R. 281).

[2] In Docket No. 11336 it was proposed to deintermix Hartford by either reserving Channel 3 for noncommercial educational use or by shifting Channel 3 to some predominantly VHF area, e.g., Rhode Island. See 13 RR 1511, 1514 (1955).

[3] See Report and Order of November 10, 1955, 13 RR 1511, 1517 (para. 8); Memorandum Opinion and Order of November 10, 1955, 13 RR 1522, 1525 (para. 5); Notice of Proposed Rule Making, November 10, 1955 in Docket No. 11532, 20 Fed. Reg. 8501 (1955).

[4] It was this facet of the November 10, 1955 Orders—the refusal by the Commission to hold VHF comparative proceedings in abeyance while it was restudying its Sixth Report—which gave rise to the *first round* of deintermixture appeals. *Coastal Bend Television Co.* v. *FCC*, 97 U.S. App. D.C. 339, 231 F.2d 498 (1956); *ibid*, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956); *Greylock Broadcasting Co.*

Thus, after much prodding by Congress and a series of "false starts," the Commission finally concluded at long last, in its *Second Report on Deintermixture* of June 26, 1956 in FCC Docket No. 11532 (13 RR 1571), that intermixture was not producing an integrated television system, that VHF in some instances was thwarting opportunities for effective competition among a greater number of stations, and, in the words of the court below, "that the intermixture of UHF and VHF channels was, on a nationwide basis, a failure." *Jacksonville Journal Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 12, 13, 246 F.2d 699, 700 (1957).

Pending a further study of the feasibility of ultimately moving all television into the UHF band (thus eliminating the intermixture problem), the Commission concluded (as an interim measure) that it would re-examine its 1952 allocations with a view to determining, *on a case-to-case basis*, whether the deletion of VHF channels in predominantly UHF areas (and the substitution of UHF channels therefor) would improve "the opportunities for effective competition among a greater number of stations" (13 RR 1571, 1582).[1]

To that end, on June 26, 1956 (concurrently with the release of its *Second Report on Deintermixture*), the Com-

---

v. *United States*, 97 U.S. App. D.C. 414, 231 F.2d 748 (1956); *Van Curler Broadcasting Corp.* v. *United States*, 98 U.S. App. D.C. 432, 236 F.2d 727 (1956); *Gerico Investment Co.* v. *United States*, 99 U.S. App. D.C. 379, 240 F.2d 410 (1957).

[1] Commissioner Doerfer dissented from the interim deintermixture conclusion thus reached by the Commission in its *Second Report on Deintermixture* (13 RR 1571, 1594-1595), on the premise that the "equitable" distribution provisions of the Communications Act (47 U.S.C. Sec. 307(b)) required the Commission to allocate VHF as well as UHF channels to major markets, and thus foreclosed the Commission from making certain markets all-UHF and others all-VHF. Commissioner Mack likewise disagreed with the "interim" portion of the *Second Report on Deintermixture* (13 RR 1571, 1593).

mission instituted some 13 proceedings to deintermix particular markets, including a proposal (FCC Docket No. 11748) to deintermix the Hartford area by shifting VHF Channel 3 to Providence, R. I. and substituting a UHF channel therefor (R. 1-2).[1] From that order Commissioners McConnaughey, Mack, and Doerfer dissented (R. 2).

In an interim report released July 23, 1956, the Senate Committee on Interstate and Foreign Commerce (which had been closely following the UHF-VHF deintermixture problem) strongly endorsed the Commission's *Second Report on Deintermixture* and urged the Commission to implement the conclusions there reached by a speedy disposition of the individual proceedings which the Commission had instituted. Senate Rep't. No. 2769, 84th Cong., 2d sess. (excerpted at R. 417-423).

On December 3, 1956 petitioners submitted detailed data on the five criteria enumerated by the Commission in its June 26 Report (13 RR 1571, 1581-1582) for eliminating a VHF assignment in a predominantly UHF area (R. 277-423; see also R. 674-717). Using the Commission's own standards for computing UHF and VHF coverage, petitioners showed that every square mile of territory

---

[1] The Commission further decided in its Second Report on Deintermixture (contrary to the policy which it had been following since November 10, 1955) to condition any subsequent VHF grants in these 13 markets on the outcome of the deintermixture proceedings and subject to the further proviso that no construction be begun until the deintermixture proceeding in that particular market was resolved. Accordingly, when the Commission granted Channel 3 to respondent on July 25, 1956, it did so subject to the foregoing conditions (see Case Nos. 235 and 242, Oct. Term 1958). This *volte face* by the Commission from its November 10, 1955 policies rendered moot a previous appeal taken by Springfield Television Broadcasting Corporation from the Commission's denial of a petition to intervene in the pending comparative hearing for Channel 3 in Hartford (Case No. 13,311, U.S. App. D.C.).

which Channel 3 in Hartford would serve lies within the Grade A or B contours of at least one, and, in most instances, three or more other stations (R. 301), with the result that no "significant numbers of people would lack service as a result of the elimination" of VHF Channel 3 in Hartford (Criterion 1). Petitioners pointed out, in response to Criterion 2, that there are more UHF stations in operation in Connecticut and in central and western Massachusetts than in any area of comparable size in the United States (R. 675)—four, five, six and even seven UHF services to substantially all portions of the so-called Connecticut Valley (R. 303). In response to Criterion 3, it was shown that substantially 100% of the sets in central Massachusetts can receive UHF signals, 93% or more in Hartford, and a lesser number in the coastal portion of Connecticut (served by Channel 8 in New Haven and receiving fringe Grade B signals from VHF stations in New York City) (see R. 754). Petitioners showed that the terrain in the Connecticut Valley "was reasonably favorable for UHF coverage" (Criterion 4), as evidenced by the fact that six UHF stations are currently operating in Connecticut and central Massachusetts (R. 301, 333, 336-337) and by the fact that these stations in the Connecticut Valley have received wide public acceptance as indicated by television audience surveys (R. 319-329). It was further pointed out that except for the prefreeze station in New Haven (Channel 8), which supplies the area with a Grade A signal (R. 301), no VHF stations place better than a Grade B or fringe signal into the Connecticut Valley (R. 301, 305); that substantial communities in Connecticut and in central Massachusetts are necessarily dependent on UHF for local television outlets (R. 286-287); that in line with experience which led to the *Second Report on Deintermixture* a second VHF operation in the Connecticut Valley (Channel 3 in Hartford plus the existing VHF operation on Channel 8 in New Haven) would jeopardize existing

UHF operations and preclude further UHF expansion in that area (R. 286-287). In the light of the foregoing data, it was urged (in line with Criterion 5) that the elimination of VHF Channel 3 would improve "the opportunities for effective competition among a greater number of stations" in Connecticut and central Massachusetts (R. 279-423).

Although not strictly germane to the criteria listed in the June 26 Report for *eliminating* a VHF allocation in a predominantly UHF area (13 RR 1571, 1582), it was further pointed out that if Channel 3 were deleted in Hartford it need not go to waste—that (if not used for noncommercial educational purposes in Hartford as petitioners had proposed in 1954) it could be shifted to southern Rhode Island from whence it would provide a *Grade A* signal to substantially all of that state (including the city of Providence); that with two VHF stations in Providence UHF could not gain a foothold in that state;[1] and that Rhode Island was badly in need of a third VHF station in order that the programs of all three networks would be available to the people of that state (R. 288-289).[2] In supplemental comments petitioners submitted

[1] As the court below knew from its so-called *Channel 16 of Rhode Island* cases (Nos. 12,537 et al.), the UHF station on Channel 16 in Providence was forced to suspend operations when the *second* VHF station went on the air in Providence (see R. 342).

[2] The only formal comments (as distinguished from letters and telegrams) submitted on December 3, 1956, in opposition to the Commission's proposal to delete Channel 3 in Hartford were filed by the conditional grantee of Channel 3. The proposal to delete Channel 3 in Hartford was endorsed in the opening comments filed December 3 by WKNB-TV, by WHYN-TV, by petitioners, by ABC, by Channel 16 of Rhode Island, Inc. (WNET), by Intercity Broadcasters, Inc. (WHIM), by Capitol Television Corporation, by WWOR-TV, by WICC-TV, and by the Joint Council on Educational Television (see R. 677-679, R. 751). JCET shifted its position in its reply comments of December 28, 1956 (R. 751). WGBH-TV opposed the utilization of Channel 3 in the Providence area in the event it was shifted from Hartford (see R. 751).

data showing that if the educational station in Boston (WGBH-TV) were required to use Westinghouse's tower, "available for the use of all the VHF stations in the Boston area" (R. 734), Channel 3 could be placed on the outskirts of Providence from whence it would place a city-grade signal over all of Providence (R. 730-743).

On February 26, released March 1, 1957, the Commission (by a 4-3 vote) decided to leave Channel 3 in Hartford for commercial use and not to deintermix the Hartford-Connecticut Valley-Providence areas (R. 751-760). In reaching that result, the Commission first took up the question whether Hartford or Providence was more in need of a VHF channel, *just as it had in 1952*, without considering what effect Channel 3 in Hartford would have on the "opportunities for more effective competition among a greater number of stations" in the Connecticut Valley area (R. 756, paras. 11-12). The fact that the intervening five years had shown that intermixture was a "failure," and that 307(b) requirements could no longer be predicated on an assumption that VHF and UHF *in combination* would produce a single, integrated system was ignored. Having found that Hartford (since it had *no* VHF station whereas Providence had *two*) was more in need of a VHF channel, the Commission thus concluded that the 1952 allocation of Channel 3 to Hartford should not be disturbed (R. 756). In *further* justification of that result the Commission pointed out that, because of WGBH-TV's present site, Channel 3 (if shifted to Rhode Island) would not provide a city-grade service (although it would provide a Grade A service) over all of Providence (R. 756-757). Petitioners' request that the Commission give consideration to requiring WGBH-TV to shift its antenna to the Westinghouse tower was rejected as untimely (R. 758, para. 16). By a separate Order adopted February 27, released March 1, 1957, the Commission removed the "no construction" condition which it had originally attached to the Channel 3 grant in Hartford (R. 943).

From these adverse actions petitioners sought reconsideration under 47 U.S.C. Sec. 405 (R. 779-812), and with the Commission having revoked the "no construction" provision in the Channel 3 grant, petitioners reasserted their interest in the adjudicatory hearing for that facility (R. 781-782, 804). They highlighted the inconsistencies between the action of the majority in the Hartford case with those taken in six other cases decided the same day where a different majority of the Commission ordered deintermixture (R. 783-801). They again asked that the Connecticut Valley be further deintermixed, either by shifting Channel 3 to Rhode Island (R. 800), by reserving it in Hartford for educational use (R. 801), or by deleting Channel 3 altogether (R. 785, 789, 801). Following the denial of that petition (R. 869-872), petitioners sought review in the court below under 47 U.S.C. Secs. 402(a) and 402(b). From an affirmance thereof (Appendix A), petitioners seek certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

The Commission's actions here challenged, as affirmed by the court below, are in certain respects contrary to the decisions of this Court and in other respects raise important and recurring questions which have not been but which should be resolved by this Court.

1. *The Decision Below Contravenes Congressional Policies Embodied in the Communications Act.*—On its own motion, concurrently with the release on June 26, 1956 of its *Second Report on Deintermixture* (13 RR 1571), the Commission instituted proceedings with a view to deintermixing 13 markets, and in that way rectifying to the degree possible the mistaken intermixture principle embodied in its 1952 allocation table. On March 1, 1957, as a result of those proceedings, the Commission simultaneously issued Reports and Orders (final or tentative) in eight general areas—Albany-Schenectady-Troy-Vail

Mills, N. Y. (22 FCC 293); Elmira, N. Y. (22 FCC 307); Springfield, Ill.-St. Louis, Mo.-Terre Haute, Ind. (22 FCC 318); Hartford, Conn.-Providence, R. I. (22 FCC 332); Peoria Ill.-Rock Island-Davenport, Moline, Ill.-Iowa (22 FCC 342); Madison, Wisc.-Rockford, Ill. (22 FCC 356); Fresno-Bakersfield-Santa Barbara, Cal. (22 FCC 365); and Evansville-Hatfield, Ind.-Owensboro, Louisville, Ky. (22 FCC 382). In six of those proceedings, the majority of the Commission voted to deintermix an area already predominantly UHF. In two proceedings (Hartford and Madison) a *different* majority voted not to deintermix (McConnaughey, Doerfer, Mack and Craven).

The Commission is under a mandate to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303 (g)) and "to provide a fair, efficient, and equitable distribution of radio service" among the several states and communities. Experience has shown that UHF "paper allocations" do not constitute "radio service" in VHF areas. Whether the basic policies thus set forth in the key provisions of the governing statute are or are not being effectuated by an administrative agency is a proper matter for judicial scrutiny. Unless the agency states the reasons for its action with sufficient precision and logic to enable the courts to determine whether the challenged action is or is not in furtherance of expressed congressional policy, the matter should be remanded to the agency for further proceedings. *Schaffer Transportation Co.* v. *United States*, 355 U. S. ——.

In the Hartford proceeding, as the three dissenting Commissioners (Hyde, Lee and Bartley) make clear, the action taken by the majority is, to say the least, contrary to concepts enunciated in the *Second Report on Deintermixture* and "at cross purposes" with actions taken by a different majority of the Commission in six other cases cided the same day (R. 751, 759-760). Here, although

such was the sole purpose of instituting the proceeding on June 26, 1956, the majority did *not* consider what the impact of a *second* VHF operation in the Connecticut Valley would be on UHF stations presently serving that area and on large cities in that area necessarily dependent on the survival of UHF for local outlets of their own (R. 751-758). In determining whether the Connecticut Valley or the Providence area was more in need of a service which could be rendered on Channel 3, the majority considered the problem just as they would have in 1952 and as though the *Second Report on Deintermixture* had never been issued.[1] The majority gave no consideration to the problem whether the public in Connecticut and central Massachusetts would not have more service if Channel 3 were deleted from Hartford, or if it were reserved for noncommercial educational use in Hartford, or if the transmitter site for commercial use was restricted to an area south of Hartford (R. 751-760).[2]

---

[1] As properly noted by the Commission's general counsel in his brief in the court below in the *WIRL* case (No. 242, Oct. Term 1958), p. 25; "The objective of both section 307(b), and the Commission's *present* action [in the *Peoria* case] is the same, the distribution of frequencies best calculated to provide the *greatest* amount of television service to the communities involved. We are confronted with a condition not a theory. *We know in retrospect what we could not know in 1952.*"

[2] On a hasty reading of the March 1, 1957 report in the Hartford case (R. 751-760) one would gain the impression that all five criteria specified in the second deintermixture report were considered (13 RR 1571, 1582). However, if one reads the decision, after being forewarned, it becomes apparent that no mention is made of the effect which a grant of Channel 3 in *Hartford* would have on the *over-all* number of stations *in the Connecticut Valley* area (the all-important fifth criterion specified in the June 26 Report for determining whether a VHF channel should be deleted from a given area). Mention is made of what Channel 3, if it were used *elsewhere*, would do toward providing additional service. In fact, some mention is made of what it would do to some UHF stations in the Connecticut Valley if it were used in *Worcester*,

That UHF stations could not survive the advent of a *second* VHF facility in the Connecticut Valley, any more than they have elsewhere in the United States (R. 331-334, 336), has been eloquently (though unfortunately) demonstrated by subsequent developments. By the action here complained of, Channel 3 was granted to The Travelers Broadcasting Service Corporation, which commenced operating on Channel 3 in Hartford on September 23, 1957 (WTIC-TV). Even though a UHF station in Hartford (WHCT on Channel 18) was owned and operated by the Columbia Broadcasting System and thus in a position to obtain CBS programs and to insist on national and regional sponsorship thereof, CBS has recently announced that it is closing its own UHF operation in Hartford and affiliating with WTIC-TV on VHF Channel 3.[1] Petitioners' continued operation in the Connecticut Valley is likewise dependent on their retention of an affiliation with NBC. If that network, on its own or as a result of advertising pressures, transfers its affiliation to VHF Channel 8 in New Haven, Conn.,[2] petitioners would *a fortiori* be forced to terminate their UHF operations in the Connecticut Valley. Springfield, Greenfield, and Holyoke, instead of having stations of their own, would thus become dependent solely on signals from

---

Mass. But, we repeat, the decision is discreetly silent on what effect Channel 3, if utilized in *Hartford*, would have on other services *in the Connecticut Valley*. Although this matter was expressly called to its attention in the petition for reconsideration (R. 780-812), the Commission again failed to face up to the problem in its Memorandum Opinion and Order denying reconsideration (R. 869-872).

[1] The full text of the press release by CBS stating its intention of terminating its UHF operation in Hartford is printed as Appendix B hereto. Under like circumstances NBC took similar action with respect to its owned-and-operated UHF station in Buffalo last June.

[2] Channel 8 in New Haven, Conn. places a Grade A signal into Springfield, Mass. (R. 301). Channel 3 in Hartford places an even stronger VHF signal into Springfield (R. 301).

outside VHF stations and would cease to have any local television outlets.[1]

Petitioners are licensees of the Commission, with limited property rights in the facilities by which they are providing a UHF service to the Connecticut Valley. *L. B. Wilson, Inc.* v. *Federal Communications Commission*, 83 U.S. App. D.C. 176, 170 F. 2d 793 (1948).[2] In its *Second Report on Deintermixture* and in other proceedings decided March 1, 1957, the Commission recognized that the intermixture of VHF and UHF stations in the same markets was a mistake, and that UHF stations could not compete in areas served by *two* VHF stations.[3] The Commission instituted proceedings to rectify that mistake in the Hartford area (Docket No. 11748). The utilization of Channel 3 in Hartford, since it will mean fewer UHF receivers in that area, will reduce petitioners' coverage in and around Hartford just as detrimentally as would

---

[1] "Section 307(b) . . . empowers the Commission to allow licenses so as to provide a fair distribution among communities. Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece." *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 362.

[2] In this important respect the status of the instant petitioners differs from that of the petitioners in Case Nos. 235 and 242 (Oct. Term 1958), the latter being merely applicants for television facilities and not existing licensees.

[3] . . . "our experience in other markets convinces us that the advent of a *second* VHF station in a UHF market, such as Albany-Schenectady-Troy, would, in all probability, destroy the ability of existing UHF stations to continue to provide service in the area." 22 FCC 293, 302 (para. 19). Cf. Commission's brief in the court below in *WIRL Television Company* v. *United States* (Br. p. 3): "It seems clear that despite the head start of the [two] UHF stations in Peoria operation there by *one* VHF station proposed in 1952 is likely *to seriously jeopardize* the continued successful operations of one or both of the existing UHF stations as well as any real possibility of the successful development of a fourth station." See also *Channel Assignment to Columbia, S.C.*, 15 RR 1682, 1688 (1957).

a grant which creates electronic interference. *Federal Communications Commission* v. *National Broadcasting Company*, 319 U.S. 239.[1]

Because of the direct impact which the retention of Channel 3 in Hartford will have on existing UHF service in the Connecticut Valley area, petitioners were entitled (either in the so-called rule-making proceeding or in the adjudicatory hearing in which they sought to intervene) to a due process determination whether the use of Channel 3 in Hartford would serve the public interest, i.e., a decision correctly setting forth the basic facts, with rational and logical conclusions drawn therefrom. That right cannot be destroyed by *labeling* a proceeding as "rule-making" rather than "adjudicatory," where the impact of the proposed "rule" is "particular and immediate" rather than "general and future." *Philadelphia Co.* v. *Securities and Exchange Com'n*, 84 U.S. App. D.C. 73, 81, 175 F. 2d 808 (1948), dismissed as moot, 337 U.S. 901. Where agency action "necessarily affects existing rights, . . . whether by the one form of action or the other, the ordinary distinction between 'quasi-legislative' and 'quasi-judicial' action gives way before the elementary requirement that rights be not destroyed or impaired without hearing." *National Broadcasting Co.* v. *Federal Communications Commission*, 76 U.S. App. 238, 248, 132 F. 2d 545 (per Rutledge, J.), aff'd on other grounds 319 U.S. 239; *Philadelphia Co.* v. *Securities & Exchange Com'n*, 84 U.S. App. D.C. 73, 175 F. 2d 808, dismissed as moot, 337 U.S. 901; *Morgan* v. *United States*, 298 U.S. 468, 480 (1936); *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C.

[1] In *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217-218 this Court noted that a community might be deprived of radio service in several ways: "More powerful stations [VHF?] in nearby cities might blanket out the signals of the local station . . . One station might dominate the other with the power of its signal."

40, 46, 175 F. 2d 351; see Davis, "Requirement of a Trial-Type Hearing," 70 *Harvard Law Review* 193-280 (1956).[1]

Absent a decision which contains basic findings on relevant public interest factors presented by the parties, with rational conclusions drawn therefrom, it is not possible for a reviewing court to determine whether the agency has or has not given effect to congressional policies embodied in the governing statute, and whether the agency has or has not impaired petitioners' rights in an arbitrary and capricious fashion, and whether it has or has not considered all relevant matters presented (5 U.S.C. Sec. 1003 (b)). In such situations a remand is required so that the agency may set forth with more precision the basis of its decision. *Schaffer Transportation Co.* v. *United States*, 355 U.S. ——.

2. *The Decision Below Is in Conflict with this Court's Decision in the Chenery Case.*—In each of the eight deintermixture proceedings decided March 1, 1957 (Peoria, Springfield, Evansville, Fresno, Elmira, Schenectady, Hartford and Madison),[2] Commissioners Hyde, Lee and Bartley voted to deintermix, by removing a VHF allocation from an area which was otherwise predominantly UHF, in line with the *Second Report on Deintermixture* and the Senate Committee's endorsement thereof. In each instance, Commissioners Doerfer and Mack voted not to deintermix—Commissioner Doerfer on the ground (contrary to subsequent decisions of the court below)[3] that

---

[1] Even in rule-making proceedings of *general* applicability, Section 4(b) of the Administrative Procedure Act (5 U.S.C. Sec. 1003(b)) precludes the promulgation of a rule until "after consideration of *all relevant matters presented.*"

[2] See 22 FCC 293-395 (1957).

[3] *Sangamon Valley Television Corp.* v. *United States*, 255 F.2d 191 (U.S. App. D.C. 1958), vacated by this Court on other grounds October 20, 1958 (No. 235); *WIRL Television Co.* v. *United States*, 253 F.2d 863 (U.S. App. D.C., 1958), vacated by this Court on other grounds October 20, 1958 (No. 242).

Section 307(b) foreclosed the Commission from deleting wide-coverage VHF channels from major markets to which they were allocated in 1952 (13 RR 1571, 1594; 22 FCC 365, 376, 378-379 and fn. 15), and Commissioner Mack apparently because of his opposition to "piecemeal" deintermixture (13 RR 1571, 1593).

Although the 13 proceedings instituted June 26, 1957, as a result of the Second Report on Deintermixture, were designed to determine *on a case-to-case basis* whether deintermixture would or would not improve the opportunities for more effective competition among a greater number of stations (in line with 47 U.S.C. Sec. 303(g)), it is apparent from Commissioner Doerfer's dissent in Fresno (22 FCC 376, 378-379), which he made applicable to each of the other cases where deintermixture was ordered (22 FCC 376, fn. 15), that he cast his vote in each of these deintermixture cases on the erroneous *legal* premise (regardless of the particular facts of record in a given proceeding) that the Commission lacked authority (by reason of 47 U.S.C. Sec. 307(b)) to delete the one and only VHF channel allocated to that market and to substitute a UHF channel therefor.

Since a key vote (Commissioner Doerfer) against deintermixing Hartford was predicated on an erroneous legal premise,[1] the decision below affirming the Commission's 4-3 action refusing to deintermix Hartford ignored the salutary doctrine, frequently enunciated by this Court, that the validity of agency action must be determined on the grounds on which the agency itself places its decision and not on some different ground, however cogent. *Secu-*

[1] The petitioner in *Sangamon Valley Television Corp.* v. *United States* re-echoed Commissioner Doerfer's views regarding 47 U.S.C. Sec. 307(b), which the court below expressly rejected (255 F.2d 191). Although this Court has since vacated that judgment on other grounds (No. 235, Oct. Term 1958), we do not construe that action as casting doubt on that phase of the lower court's decision.

rities and Exchange Com. v. *Chenery Corp.*, 318 U.S. 80, 87-88. How Commissioner Doerfer, and perhaps Commissioner Mack, would have voted had they decided the Hartford case on *the facts of record*, uninfluenced by the *erroneous* belief that they were precluded as a matter of law (by reason of 47 U.S.C. Sec. 307(b)) from removing Channel 3 from Hartford, a court can only speculate. In such situations, under the *Chenery* doctrine, the case should be remanded to the administrative agency. Because of the impact on petitioners, of retaining Channel 3 in Hartford, petitioners were entitled to a decision predicated *on the facts developed on the record*, and not one resulting from a mistaken interpretation of the requirements laid down by Congress in 47 U.S.C. Sec. 307 (b).

The *Chenery* doctrine is especially applicable here. As the Court will note (R. 751), the majority decision of the Commission is that of two Commissioners (Doerfer and Mack). The other two on the majority side (Commissioners McConnaughey and Craven) merely concurred in the result (R. 751). Commissioners Hyde, Lee and Bartley dissented (R. 759-760). Thus, in effect, the only reasons given for the Hartford result are those of two Commissioners, who dissented from the Second Deintermixture report (13 RR 1571, 1593-1595), from the initiation of the Hartford proceeding (R. 2), and who proceeded on the erroneous *legal* premise that Section 307(b) of the Communications Act precluded the deletion of Channel 3 in Hartford.[1] In "concurring in the result" (R. 751), neither Chairman McConnaughey nor Commissioner Craven stated his reasons. Under such circumstances it is

[1] This fact no doubt explains why the decision in the *Hartford* case (unlike the Reports and Orders in the other 'deintermixture' proceedings decided the same day) did *not* consider what the impact of a *second* VHF operation in the Connecticut Valley would be on cities in that area entirely dependent on UHF for local outlets of their own.

impossible, unless effect is given to the *Chenery* doctrine, for a court to ascertain whether the decision here challenged conforms to the governing statute under which the Commission functions and whether the result is or is not "arbitrary and capricious."[1]

3. *The Decision Below Raises Important Questions Which Have Not Been but Which Should Be Resolved by This Court.*—As heretofore noted, concurrently with the release on June 26, 1956, of its *Second Report on Deintermixture*, the Commission instituted proceedings with a view to deintermixing 13 markets. The Commission made it clear that requests to deintermix other markets would be considered in due course (13 RR 1571, 1584, para. 37). On March 1, 1957, as a result of these proceedings, the Commission simultaneously issued Reports and Orders (final or tentative) in eight general areas (22 FCC 293-382).

Five of these cases have since been separately appealed to the court below, with the Commission's actions deintermixing or refusing to deintermix affirmed in each of the four cases thus far decided (Peoria, Springfield, Madison and Hartford).[2] The fifth is awaiting decision.

---

[1] That Commissioners McConnaughey and Craven, in voting to keep Channel 3 in Hartford, were much influenced by the fact that Channel 3, if used in Rhode Island, would not place a city-grade signal over all of Providence is clear from their subsequent testimony before the Senate Committee on Interstate and Foreign Commerce (Hearings, "Television Inquiry," 85th Cong. 1st Sess. Part V, p. 3283). But this "reason" does not justify *affirmative* action retaining Channel 3 in Hartford, in the light of the fact that in two other cases decided the same day the VHF channel was "placed on ice" so as to preserve multiple UHF operations (22 FCC 293, 22 FCC 307).

[2] *WIRL Television Co.* v. *United States*, 253 F.2d 863 (U.S. App. D.C. 1958), vacated by this Court on other grounds October 20, 1958 (No. 242, Oct. Term 1958); *Sangamon Valley Television Corp.* v. *United States*, 255 F.2d 191 (U.S. App. D.C. 1958), vacated by this Court on other grounds October 20, 1958 (No. 235,

Other deintermixture proceedings decided March 1, 1957 by the Commission (e.g., Fresno and Evansville) are awaiting "show cause" hearings under 47 U.S.C. Sec. 316 before they can be finalized by the Commission and reviewed by the courts. Requests to deintermix other areas have since been decided by the Commission and numerous petitions to deintermix still other markets are awaiting action by that agency.[2]

In short, a substantial volume of the Commission's current workload relates to proposals to improve the 1952 television allocation table by making some markets all-UHF and others all-VHF—in an effort to provide more effective competition among a greater number of stations, thereby preserving for future use the 70 UHF channels essential to a truly nationwide competitive television system.

In each of these deintermixture proceedings, because this Court has not yet spoken on these matters, substantial portions of the comments filed by interested parties deal with questions of the Commission's authority to take the action it proposes (cf. R. 4-24, 42-45, 74-77, 80-275), with diametrically opposite views expressed on the scope and limitations of Sections 303(g) and 307(b) of the Communications Act (47 U.S.C. Secs. 303(g) and 307 (b)), and on the need for adjudicatory hearings under Sections 303(f) and 316 of the Communications Act (47 U.S.C. Secs. 303(f) and 316), especially where the impact of a so-called "rule-making" proceeding is "particular and immediate" rather than "general and future." See *Phil-*

Oct. Term 1958); *Springfield Television Broadcasting Corp.* v. *United States*, —— F.2d —— (U.S. App. D.C. 1958); and *Winnebago Television Corp.* v. *United States*, 258 F.2d 163 (U.S. App. D.C. 1958).

[2] E.g., *Channel Assignment to Columbia, S.C.*, 15 RR 1682 (1957); *Walla Walla Deintermixture Case*, 16 RR 1636 (1958); *Channel Assignments in Pittsburgh, Pa.*, 16 RR 1558 (1957); see 22 Fed. Reg. 2050, 3127, 3185, 4365, 5613.

adelphia Co. v. Securities and Exchange Com'n, 84 U.S. App. D.C. 73, 175 F. 2d 808 (1948), dismissed as moot, 337 U.S. 901 (1949).

With individual members of the Commission themselves in disagreement over the scope and limitations of 303(g) and 307(b), as evidenced by Commissioners Hyde, Lee and Bartley voting to deintermix and with Commissioner (now Chairman) Doerfer taking the position that he is precluded as a matter of law (by reason of 47 U.S.C. Sec. 307(b)) from deleting a VHF channel in a major market (13 RR 1571, 1594; 22 FCC 378-379), the matter of the Commission's legal authority in this field is one of general importance to the broadcast industry. The Commission's precise authority on this score thus presents important and recurring questions which have not yet been but which should be decided by this Court.

Since all appeals from Commission action under Section 402(b) of the Communications Act (47 U.S.C. Sec. 402(b)) must be brought, and since most appeals under Section 402(a) of that Act (47 U.S.C. Sec. 402(a)) are brought, in the court below, the occasion for a conflict of circuits will be rare.[1] With the future course of television broadcasting (whether on VHF alone, on UHF alone, or on an intermixed or a deintermixed basis) at issue, the question of the Commission's authority to deintermix or not to deintermix given markets, and the extent to which its actions in this field are limited by Sections 303(f), 307(b) and 316 of the Communications Act (47 U.S.C. Secs. 303(f), 307(b) and 316) is a matter

[1] Since 1956 the court below has decided on the merits no fewer than nine deintermixture appeals (see cases cited in fn. 4 p. 9 and fn. 2 p. 24), in each instance affirming vacillatory results reached by the Commission. No such cases have been decided on the merits in any of the other circuits. Where, as here, the actions complained of include the Channel 3 grant to one of the respondents and a renewal grant to another (WGBH-TV), review in the court below was mandatory under 47 U.S.C. Sec. 402(b).

of sufficient and recurring public importance to merit consideration by this Court.

4. *The Decision Below Should in Any Event Be Vacated.*—On June 26, 1956, pursuant to its Second Deintermixture Report, the Commission instituted deintermixture proceedings in 13 critical television areas. On March 1, 1957, decisions were released in eight of those proceedings (including Peoria, Springfield, and Hartford). Four of those cases have been heard and affirmed by the court below. Its decision in two of those cases were vacated by this Court on October 20, 1958, because of *ex parte* presentations allegedly made to individual Commissioners in the Springfield proceeding and the interrelationship between the proceedings in Springfield and Peoria (Nos. 235 and 242, Oct. Term 1958).

The above-mentioned deintermixture decisions all stem from the Commission's *Second Report on Deintermixture*; they were considered by the Commission together, with each of these various decisions announced the same day (March 1, 1957). In the words of the court below, this case, like those, "involve[s] a phase of the UHF-VHF problem in television" (Appendix A). In short, all these deintermixture cases are closely interrelated both factually and legally.[1]

[1] In refusing to shift Channel 3 to *Providence*, because it would not (without a shift of WGBH-TV's transmitter site) provide a *city-grade* service to all of Providence, the Commission may have been influenced by the belief that it had a preferable alternative for placing a third needed VHF channel in that market. To that end it promptly instituted a new proceeding designed to place a third VHF channel in Providence. Having recently concluded that this "preferable alternative" is not feasible (FCC Mimeo. 65051), the Commission should be afforded an opportunity to compare the needs of Providence and Hartford, especially in the light of the intervening impact which the Channel 3 grant has had on UHF facilities essential to an adequate television service in the Connecticut Valley (see R. 753, para. 5). In there refusing to place a VHF channel in Springfield, Mass., it is ironical indeed in the light of its actions here challenged, that the Commission was of

With charges of *ex parte* presentations pending in at least one of these deintermixture proceedings,[1] and with the vote of resigned Commissioner Mack necessary to the result reached by the majority in the instant case, certiorari should be granted, the decision below should be vacated, and the case remanded for appropriate further proceedings (as in Nos. 235 and 242)—so that the various interrelated deintermixture cases heretofore decided by different majorities of the Commission can be resolved with some degree of logic and consistency.

WHEREFORE, it is respectfully prayed that the instant petition for writ of certiorari be granted.

Respectfully submitted,

By JAMES A. MCKENNA, JR.
VERNON L. WILKINSON
Counsel for Petitioners

Of Counsel:
McKENNA & WILKINSON
1735 DeSales Street, N. W.
Washington 6, D. C.

November 14, 1958.

---

the view "that the assignment of a VHF channel to Springfield would worsen rather than improve the competitive television situation in the Springfield area and *would not solve the need of this area for multiple local outlets and service.*" (FCC Docket 11957, released October 31, 1958).

[1] It is the Commission's position that it is not limited in the discharge of its quasi-legislative responsibilities, as in cases of adjudication, to "matters presented on the record." See Commission response of October 30, 1958, in *Owensboro on the Air, Inc.* v. *Federal Communications Commission*, Case No. 13,776 et al (U.S. App. D.C.); see Brief in Opposition, *Van Curler Broadcasting Corp.* v. *United States* (No. 489, Oct. Term 1956). The record certified by the Commission to the court below in the instant proceeding is restricted to formal pleadings.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14050

SPRINGFIELD TELEVISION BROADCASTING CORPORATION and GREENFIELD TELEVISION BROADCASTING CORPORATION, APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
THE TRAVELERS BROADCASTING SERVICE CORPORATION and THE WGBH EDUCATIONAL FOUNDATION, INTERVENORS

No. 14051

SPRINGFIELD TELEVISION BROADCASTING CORPORATION and GREENFIELD TELEVISION BROADCASTING CORPORATION, PETITIONERS

v.

THE UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

THE TRAVELERS BROADCASTING SERVICE CORPORATION and THE WGBH EDUCATIONAL FOUNDATION, INTERVENORS

Petition for Review and Appeal from Orders of the Federal Communications Commission

Decided June 19, 1958

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.*, was on the brief, for appellants in No. 14050 and petitioners in No. 14051.

Mr. Richard A. Solomon, Assistant General Counsel, Federal Communications Commission, with whom *Mr. Edgar W. Holtz*, Acting General Counsel, Federal Communications Commission, *Mr. Charles C. McCarter*, Counsel, Federal Communications Commission, and *Mr. Daniel M. Friedman*, Attorney, Department of Justice, were on the brief, for appellee in No. 14050 and respondents in No. 14051.

Mr. Percy H. Russell, with whom *Mr. Aloysius B. McCabe* was on the brief, for intervenor The Travelers Broadcasting Service Corporation.

Mr. Edgar F. Czarra, Jr., with whom *Mr. Ernest W. Jennes* was on the brief, for intervenor The WGBH Educational Foundation.

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges.

PRETTYMAN, *Circuit Judge:* These cases are a petition to review and an appeal from orders of the Federal Communications Commission. They involve a phase of the UHF-VHF problem in television. The locale involved is a portion of the Connecticut Valley, centered about Hartford.

Allocation of UHF channels began in 1952 with the Commission's Sixth Report and Order. In the Connecticut-Rhode Island area thirteen UHF stations and four VHF stations were allocated, two of the latter to each state. Channel 3 was assigned to Hartford. The proceeding to award the license was a long comparative one and was not concluded until 1956, when Travelers Broadcasting Service Corporation, intervenor here, was awarded a construction permit. The award was originally conditional, due to the present proceedings, but the condition was later lifted.

In the meantime the licenses on the UHF channels, being without contest, were quickly awarded, and the

licensees went on the air. In 1954 petitioner-appellant Springfield Television, a UHF operator whose station is at Springfield, Massachusetts, and several other UHF operators in the general area brought proceedings seeking the deletion of the VHF Channel 3 from Hartford. Proceedings were brought twice, and twice the Commission denied deletion. Thereafter came a series of considerations by the Commission revolving about the nationwide problem of VHF-UHF competition. Among other proceedings during this time the Commission instituted a rule-making for the purpose of considering the deletion of Channel 3 from Hartford. The proposal was to shift Channel 3 from Hartford to Providence, Rhode Island, and to substitute in its place a UHF Channel 61. This would have made the Hartford area all UHF except for the one VHF station at New Haven. Proponents and opponents appeared; comments and counter-comments were filed. The Commission issued its Report and Order denying the transfer. After various procedural motions for redetermination, etc., these appeals were taken.

The essence of the contentions of petitioner-appellants is that they are existing UHF licensees in this area and that the grant of a second VHF operation at Hartford (Channel 8 being already in use at New Haven) would provide two Grade A or better VHF signals to the area, thus jeopardizing, if not destroying, petitioner-appellants' operations and depriving a number of communities, entirely dependent on UHF, of their only local outlets. Petitioner-appellants say they are entitled to have such issues "resolved" in a rational and not an arbitrary fashion. They say that, where the impact of administrative action on licensed rights is particular and immediate, existing rights cannot be destroyed except by complying with essential minima of procedural due process. They say they did not have due process here, in that the Commission failed "to face up to and rationally dispose of private and public interest matters"; it did not

consider what impact a second VHF station in the Connecticut Valley would have on existing UHF stations; and it did not consider whether the destruction of UHF operations would leave numerous substantial cities with no stations of their own (so-called "white areas"), or whether the reservation of Channel 3 for educational purposes or its complete deletion would result in more rather than less service in the Connecticut Valley and in central Massachusetts, or whether Rhode Island needed a third VHF station. They say that rules can be promulgated only after consideration of all relevant matters presented and that, when the Commission fails to mention voluminous data bearing on the public interest or to set forth a rational basis for decision, it is not possible for a reviewing court to perform its review function. They say, in summation, that the Commission's decision was unreasoned and arbitrary.

We look at the Report and Order. It contained a recitation of some basic or background material and principles and described the area involved and the existing stations. The high rate of conversion of receiver sets for UHF reception in the vicinity of Hartford indicates that UHF stations render adequate service there, but the Connecticut Valley in general is not suited for such reception on account of its wooded, rough, hilly terrain. The Commission thought, however, that this situation is not as bad as it was painted by those opposing deintermixture. The Commission said that, while on the record[1] it could not estimate with certainty whether a "white area" would exist if Channel 3 were deleted, it was "practically certain" that UHF would not approach the perfection claimed by its proponents. There are without doubt, said the Commission, terrain pockets where

[1] The Commission also pointed out that the making of a completely certain record on the point would entail prohibitive time and expense.

UHF reception would not be satisfactory, and a station at Hartford on Channel 3 would fill in those areas; and the number of persons thus affected would be substantial. There is no "white area" in Rhode Island. After some further consideration along the same line the Commission concluded that it could not say Providence had a greater need for Channel 3 or that the move would result in a fairer, more efficient and equitable distribution of facilities.

Moreover considerations of the rules respecting minimum transmitter spacings led the Commission to conclude against the move of the channel to Providence. The transmitter of a Channel 3 station operating there would have to be located so far south that it could not provide a principal city signal over all or even a greater part of the city. "This fact alone," said the Commission, "would likewise prevent the proposed assignment."

The foregoing is enough to indicate the course followed by the Commission and the nature of its determination.

In its order denying reconsideration the Commission was more succinct and emphatic. It stated its conclusion that Channel 3 in Hartford would provide service to "pockets" of white area in Connecticut and Massachusetts and would also be more likely to provide a second service to a substantial number of people. It found that the assignment to Providence or thereabouts would not compensate for the loss of service near Hartford. It recited as another important consideration the fact that the channel could not be used efficiently in Providence or in southern Rhode Island.

Before us the Commission emphasizes, rightly, that it is impossible to use rigid criteria as the basis for a decision to deintermix or not to deintermix any particular community, because of the widely varying circumstances in individual markets and the numerous factors which

bear on the choice in each area. This is a simple factual truth. The problem is an evaluation of factors, differing in each situation. Congress put that evaluation primarily in the hands of its agent, the Commission. It did not authorize the courts to reappraise the merits of such conclusions.

In respect of petitioner-appellants' contentions we must note that Channel 3 was assigned to Hartford at the same time their UHF stations were allocated there; they took their licenses with full knowledge of the situation; they are trying to change an allocation which has existed as long as have theirs. So their argument in respect to the effect of this long-delayed grant on existing operations is unimpressive. The ony difference between them is that their grants were made quickly and this one was contested by other applicants. In the next place we note that the Commission followed the procedural requirements for rule-making, and this was a rule-making proceeding. In the third place we think the conclusions of the Commission were not only rational but reasonable. The VHF station at Hartford had benefits for the area, and the move to Providence would have been fraught with many practical difficulties. This latter seems tacitly admitted by petitioner-appellants when they suggest that this channel might be deleted entirely or reserved for educational purposes. We do not find the orders of the Commission arbitrary, unreasonable, or without ample support.

Affirmed.

BAZELON, Circuit Judge, concurs in the result. *Mackey* v. *United States and Federal Communications Comm'n* (No. 14239, decided May 22, 1958); *Coastal Bend Television Co.* v. *Federal Communications Comm'n*, 98 U.S.App. D.C. 251, 234 F.2d 686 (1956); *Van Curler Broadcasting Corp.* v. *United States*, 98 U.S.App.D.C. 432, 236 F.2d 727 (1956).

APPENDIX B

From:

COLUMBIA BROADCASTING SYSTEM, INC.
485 Madison Avenue, New York 22, N. Y.
Plaza 1-2345

October 9, 1958

CBS ANNOUNCES TELEVISION STATION CHANGES IN HARTFORD, CONNECTICUT

CBS will terminate operation of its UHF television station WHCT (Channel 18), Hartford, November 15, 1958; and at the same time, the CBS Television Network is affiliating, effective November 16, 1958, with WTIC-TV (Channel 3), Hartford, it was announced today by Frank Stanton, President, Columbia Broadcasting System, Inc. WTIC-TV is owned and operated by Travelers Broadcasting Service Corp.

In making this announcement, Dr. Stanton stated, "We have decided to terminate operations of WHCT, owned and operated by CBS for more than two years, with great reluctance and deep regret.

"WHCT has been rendering an excellent service in the immediate Hartford area. In the last year, however, two VHF stations also have been serving Hartford proper and the general Hartford area. Recently the CBS Television Network was offered the opportunity to affiliate with WTIC-TV, one of these two VHF stations, whose management has pioneered in broadcasting. To make its programs more widely available to the residents of the important Connecticut River Valley, to provide greater coverage to its network advertisers, and because of decisive network competitive considerations, the network felt compelled to affiliate with WTIC-TV while the opportunity was still available. To ignore the opportunity at

this time would have placed the network at the grave risk of a serious competitive disadvantage for the indefinite future.

"These special circumstances led to the decision to terminate operations of WHCT. It is our current intention to continue to own and operate WXIX, Channel 18, Milwaukee. This UHF television station recently shifted from Channel 19 to Channel 18, in an effort to eliminate technical interference. We anticipate that the public will receive improved reception from this move, but the full results cannot be assessed for some time. Further, the acute problem of limited availability of a VHF affiliation, present in Hartford, is absent in Milwaukee.

"CBS is still hopeful about the future of UHF. We continue to believe that in appropriate circumstances, UHF can provide a fully satisfactory and competitive service. We will seek another UHF investment to restore the full permissible station ownership quota under FCC regulations."

• • • •